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Lim Keng Jit (suing in the capacity of an authorised member under s 9(c) of the Societies Act 1966 for Persatuan Penduduk Parkville Jalan PJU 3/32–3/37 Sunway Damansara, Petaling Jaya, Selangor) v Majlis Bandaraya Petaling Jaya

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-426–06 OF 2022

HAS ZANAH MEHAT, CHE MOHD RUZIMA AND SEE MEE CHUN JJCA

10 JULY 2023

C

Local Government — City Council — Decision — Residents' Association ('RA') in guarded community area proposed to require residents who did not monetarily contribute to the security scheme to operate the boom-gates themselves to enter or exit the residential area — Whether City Council's decision barring RA from implementing the proposal was unreasonable — Whether RA was entitled to implement the move as it was unfair and unreasonable for non-paying residents to enjoy the benefits of the guarded community without paying a single cent towards its existence and maintenance — Whether measures to ensure continued life of guarded community in the interests of all the residents was more important and outweighed any inconvenience non-paying residents might suffer if they had to operate the boom-gates themselves

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The appellant residents' association ('RA') had obtained the approval of the respondent ('MBPJ') to turn its residential area into a guarded community with security guards and a boom-gate to permit only authorised persons to enter the residential area. In allowing the guarded community concept for the area, MBPJ had imposed, inter alia, a condition that residents who did not contribute monetarily to the security scheme should not be required to alight from their vehicles to operate the boom-gates themselves, without the assistance of the security guards on duty, in order to enter or exit the residential area ('the condition'). MBPJ had warned that the approval for the guarded community scheme would be revoked if the conditions attached to the approval were not adhered to. Backed by overwhelming support from its members, the RA wrote to MBPJ stating that it intended to require residents who did not contribute to the guarded community scheme to operate the boom-gates themselves ('the RA's move') following a decision of the Federal Court in *Au Kean Hoe v Persatuan Penduduk D'villa Equestrian* [2015] 4 MLJ 204 ('Au Kean Hoe'). MBPJ rejected the RA's move ('the decision'). The appellant filed a judicial review ('JR') application to quash the decision and obtain a declaration that MBPJ had no right to impose the condition when

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approving the security scheme and that the appellant was entitled to implement the RA's move for the benefit of the guarded community. The High Court dismissed the JR application holding, inter alia, that: (a) *Au Kean Hoe* had no application to the instant case; (b) MBPJ's decision was not shown to be illegal, irrational or unreasonable; (c) there was nothing to show that the RA's move was necessary for or conducive to the public safety, health and convenience of the residents; and (d) the RA's move seemed to be intended to compel non-paying residents to become members of the RA and to pay for the security scheme.

Held, unanimously allowing the appeal, setting aside the High Court's decision and allowing the JR application:

(1) In *Au Kean Hoe*, the Federal Court found that the condition requiring residents who did not pay the monthly fee for security and maintenance charges to open the boom gates themselves without the assistance of the security guards on duty was not an actionable nuisance but only an inconvenience which had to be undergone in the interest of the community as a whole. In that context, the RA's move to require non-paying residents to open the boom-gates themselves was in the larger interests of the guarded community and was not prohibited (see paras 53 & 55–67).

(2) In its supporting affidavit, the appellant had referred to incidents of theft, attempted thefts and break-ins that had taken place in the residential area to show that security and safety issues existed. As such, it was unfair and unreasonable for non-paying residents to enjoy the benefits of a guarded community without making any contribution towards it. By requiring such individuals to open the boom-gate themselves without the assistance of the security guards, they would merely suffer an inconvenience, as in *Au Kean Hoe*. There had to be a sense of collective responsibility towards the greater good to ensure the safety and security of the residential area (see paras 59–60).

(3) In the light of the decision in *Au Kean Hoe*, MBPJ had to exercise its power to do all things necessary for or conducive to public safety, health and convenience pursuant to s 101(v) of the Local Government Act 1976, in a way that struck a balance between the rights of the individual and those of the community (see paras 62–63).

(4) MBPJ's refusal to exempt the RA from complying with the condition that no driver could be ordered to alight from his vehicle to open the boom-gate himself in order to use the access road to the residential area was not reasonable. The larger interests of the community had to prevail over the rights of the individual; issues of public safety and security had to prevail over matters of inconvenience. The RA's move was necessary to ensure the proper functioning of a security system for the residential area.

It was unreasonable for non-paying individuals to enjoy the benefits of a guarded community without paying a single cent. The RA's move could not be construed as an attempt to force non-paying residents into joining the RA. The RA was entitled to implement its intended action. Consequently MBPJ's decision had to be quashed (see paras 64–66).

[Bahasa Malaysia summary

Perayu-perayu ('perayu') yang merupakan persatuan penduduk perumahan ('PPP') telah memperoleh kebenaran responden ('MBPJ') untuk menjadikan kawasan perumahannya sebagai satu kawasan komuniti berpengawal yang mempunyai pengawal keselamatan dan pintu berpalang untuk membenarkan orang yang mempunyai kebenaran sahaja untuk memasuki kawasan perumahan itu. MBPJ membenarkan permohonan tersebut dengan syarat, antara lain, penduduk yang tidak menyumbang secara kewangan kepada pengurusan komuniti berpengawal itu tidak perlu keluar dari kenderaan mereka untuk mengalihkan palang keselamatan itu sendiri, tanpa bantuan pengawal keselamatan yang bertugas, untuk masuk atau keluar dari kawasan perumahan tersebut ('syarat tersebut'). MBPJ memberi amaran bahawa kelulusan skim komuniti berpengawal itu akan dibatalkan sekiranya syarat-syarat di dalam kelulusan itu tidak dipatuhi. Disokong oleh ahli-ahlinya, PPP menulis kepada MBPJ menyatakan bahawa penduduk yang tidak menyumbang kepada skim komuniti berpengawal harus mengalihkan palang keselamatan itu sendiri ('langkah PPP tersebut') berikutan keputusan Mahkamah Persekutuan dalam *Au Kean Hoe v Persatuan Penduduk D'villa Equestrian* [2015] 4 MLJ 204 ('Au Kean Hoe'). MBPJ menolak tindakan PPP tersebut ('keputusan tersebut'). Perayu memfailkan permohonan semakan kehakiman ('SK') untuk membatalkan keputusan tersebut dan mendapatkan perisytiharan bahawa MBPJ tidak mempunyai hak untuk mengenakan syarat tersebut ketika meluluskan skim komuniti berpengawal itu dan perayu berhak melaksanakan tindakan PPP untuk kepentingan masyarakat di kawasan tersebut. Mahkamah Tinggi menolak permohonan SK tersebut, antara lain, bahawa: (a) prinsip kes *Au Kean Hoe* tidak terpakai untuk kes ini; (b) keputusan MBPJ tidak terbukti menyalahi undang-undang, tidak rasional atau tidak munasabah; (c) tiada apa-apa yang menunjukkan bahawa langkah PPP tersebut perlu atau bersesuaian untuk keselamatan awam, kesihatan dan kemudahan penduduk; dan (d) langkah PPP seolah-olah bertujuan untuk memaksa penduduk yang tidak membayar untuk menjadi ahli PPP untuk membayar skim keselamatan tersebut.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan membenarkan permohonan SK:

(1) Di dalam kes *Au Kean Hoe*, Mahkamah Persekutuan memutuskan bahawa syarat yang mewajibkan penduduk yang tidak membayar yuran bulanan bagi yuran keselamatan dan penyelenggaraan untuk membuka

palang keselamatan itu sendiri tanpa bantuan pengawal keselamatan yang bertugas bukanlah satu kacau ganggu tetapi ianya perlu untuk kepentingan masyarakat secara keseluruhan. Dalam konteks ini, langkah PPP untuk mewajibkan penduduk yang tidak membayar untuk membuka palang keselamatan itu sendiri adalah demi kepentingan masyarakat yang dilindungi dan ianya tidak dilarang (lihat perenggan 53 & 55–67).

(2) Di dalam afidavit sokongannya, perayu telah merujuk kepada insiden-insiden kecurian, cubaan mencuri dan pecah masuk yang telah berlaku di kawasan perumahan itu untuk menunjukkan bahawa isu keselamatan telah timbul. Oleh itu, adalah tidak adil dan tidak munasabah bagi penduduk yang tidak membayar untuk menikmati faedah komuniti yang dilindungi tanpa membuat sebarang sumbangan. Dengan mewajibkan individu sedemikian membuka palang keselamatan itu sendiri tanpa bantuan pengawal keselamatan, mereka hanya akan mengalami kesulitan, seperti di dalam kes *Au Kean Hoe*. Adalah perlu untuk mempunyai rasa tanggungjawab kolektif terhadap perkara baik yang lebih besar untuk memastikan keselamatan kawasan perumahan tersebut (lihat perenggan 59–60).

(3) Berdasarkan keputusan di Au Kean Hoe, MBPJ menggunakan kuasanya untuk melakukan semua perkara yang perlu atau bersesuaian untuk keselamatan awam, kesihatan dan kemudahan awam menurut perkara 101(v) Akta Kerajaan Tempatan 1976 dengan cara yang mencapai keseimbangan antara hak individu dan masyarakat (lihat perenggan 62–63).

(4) Keengganan MBPJ dalam mengecualikan PPP dari mematuhi syarat bahawa tiada pemandu boleh diarahkan turun daripada kenderaannya untuk membuka palang keselamatan sendiri untuk keluar masuk di kawasan perumahan itu adalah tidak munasabah. Kepentingan masyarakat yang lebih besar harus mengatasi hak-hak individu; Isu keselamatan dan keselamatan awam harus diutamakan dari perkara-perkara yang menimbulkan kesulitan. Langkah PPP itu perlu bagi memastikan fungsi sistem keselamatan yang baik untuk kawasan perumahan. Adalah tidak munasabah bagi individu yang tidak membayar skim tersebut untuk menikmati faedah komuniti yang dilindungi tanpa membayar satu sen pun. Tindakan PPP itu tidak boleh dilihat sebagai percubaan untuk memaksa penduduk yang tidak membayar untuk menyertai PPP. PPP berhak melaksanakan tindakan yang sepatutnya. Oleh yang demikian, keputusan MBPJ harus diketepikan (lihat perenggan 64–66).]

Cases referred to

Au Kean Hoe v Persatuan Penduduk D'villa Equestrian [2015] 4 MLJ 204; [2015] 3 CLJ 277, FC (refd)

Au Kean Hoe v Persatuan Penduduk D' villa Equestrian [2014] 3 MLJ 719; [2014] 10 CLJ 1, CA (refd)

Legislation referred to

Local Government Act 1976 s 101(v)
Rules of Court 2012 O 53 r 2(4)
Street, Drainage and Building Act 1974 s 46(1)(a)
Town and Country Planning Act 1976

Appeal from: Application for Judicial Review No BA-25-24–04 of 2021 (High Court, Shah Alam)

Malik Imtiaz (with Surendra Ananth) (Surendra Ananth) for the appellant.
Yatiswara Ramachandran (with Kenny Chan Yew Hoong and Leslie Ho Ying) (Yatiswara, Ng & Chan) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] The boom gate-boon or bane? This is indeed a question which has confronted residents and residents' associations in guarded communities and local authorities and at times, the courts, when the matter escalates into a dispute. This appeal is one such example.

[2] The appellant as the applicant is an authorised officer of the Residents Association of Parkville Sunway Damansara (RA and Residential Area). The respondent is the Majlis Bandaraya Petaling Jaya (MBPJ), the relevant local council under the Local Government Act 1976 ('the LGA').

[3] The appellant had sought to challenge by way of judicial review ('JR') the decision of the respondent dated 30 March 2021 ('the decision') essentially rejecting the appellant's application to impose a rule that non-paying owners and residents or non-residential members of the RA have to operate the boom gates by themselves without the assistance of security guards ('the condition').

[4] The JR challenge was unsuccessful in the High Court. On appeal before us, we had allowed the application for the reasons as below.

A BACKGROUND FACTS

[5] The RA was first registered as a society on 20 August 2007. On 12 December 2017, it had applied to MBPJ for the RA to be a guarded community. Then, 90.23% of the residents in the Residential Area had consented to it. The application was approved for two years from 1 November 2018 until 31 October 2020 ('the 2018 approval'). The condition in para 2(iii) is that no driver of any vehicle could be ordered to alight from his car to open the boom gate by himself to enable his vehicle to use the access road to the Residential Area.

[6] The RA was de-registered on 20 November 2018. It was however re-registered on 26 December 2019. On 19 September 2020, the RA had its first Annual General Meeting ('AGM') where it was resolved, inter alia, to submit a renewal application to continue as a guarded community and to impose a condition that non-members of the RA would have to operate the boom gate themselves without the assistance of security guards.

[7] On 9 October 2020, the RA submitted its application to renew MBPJ's approval to operate as a guarded community.

[8] On 8 December 2020, the renewal was granted for a period from 1 December 2020 until 1 December 2022 ('the 2020 approval') with a stipulation that the RA cannot direct that non-members have to register with the guard house in order to gain entry into the RA.

[9] On the same day too, another letter was sent attaching the *Garis Panduan Komuniti Berpengawal* ('guarded community') *Di Kawasan Majlis Bandaraya Petaling Jaya* (*Penambahbaikan* 2017) ('the 2017 guidelines'). That letter stated that all RAs were to comply with the guidelines and any breach would result in enforcement action.

[10] On 21 December 2020, the RA wrote to MBPJ stating it will be imposing the condition based on the decision in *Au Kean Hoe v Persatuan Penduduk D'villa Equestrian* [2015] 4 MLJ 204; [2015] 3 CLJ 277.

[11] There were complaints from residents in the RA on the condition which prompted a visit from MBPJ on 27 January 2021. There followed other letters from the RA maintaining its position and appealing that it be exempted from the requirement in para 4(iii) of the 2020 approval that drivers of vehicles cannot be required to get out of their vehicles to open any barrier blocking the road leading into the Residential Area.

[12] On 30 March 2021, MBPJ rejected the RA's request to impose the condition. The decision was communicated to the RA by letter dated 7 April 2021.

[13] There were then other correspondences, this time involving the solicitors. Eventually the RA agreed without prejudice to their JR application to allow the residents of the RA who did not participate in the guarded community to use the residents' lane when entering or leaving the Residential Area.

THE JR APPLICATION

[14] In the JR application dated 28 April 2021, the appellant sought the following reliefs:

> 1.1. A direction of the nature of certiorari to quash the decision of the respondent dated 30.03.2021, which was communicated to the applicant by way of a letter dated 07.04.2021, in rejecting the application of Persatuan Penduduk Parkville Jalan PJU 3/32-3/37 Sunway Damansara, Petaling Jaya, Selangor ('RA') to impose a rule that non-paying owners and residents or non-members of the RA in the townhouses in Jalan PJU 3/32, Jalan PJU 3/33, Jalan PJU 3/34, Jalan PJU 3/35, Jalan PJU 3/36 and Jalan PJU 3/37, Sunway Damansara, Petaling Jaya, Selangor (the 'Residential Area') have to operate the boom gates by themselves with out the assistance of security guards;
>
> 1.2. A declaration that the RA is entitled to impose a rule that non-paying owners and residents or non-members of the RA in the Residential Area have to operate the boom gates by themselves without the assistance of security guards;
>
> 1.3. A declaration that the respondent, in approving a guarded community application, is not entitled to impose a condition that the RA cannot require non-paying owners and residents or non-members of the RA to operate the boom gate by themselves; and/or

[15] In para 9 of the affidavit in support ('AIS'), it was stated as follows:

> 9. In the AGM, the following were unanimously resolved:
>
> 9.1 A renewal application would be made to the respondent for the Residential Area to be a guarded community.
>
> 9.2 An Application would be made to the land office to obtain a temporary operating license to set up a guard house and boom gate.
>
> 9.3 A condition would be imposed that non-members of the RA would have to operate the boom gate themselves without the assistance of security guards (the 'Condition'). There will be a button for such residents to press themselves to open the boom gate.

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> Members would be given access cards which would enable the automatic lifting of the boom gate.

Refer to encl 4/28 and minutes of AGM, para 3.1, encl 5/36.

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[16] In paras 9.4 to 9.6 of the AIS (encl 4/28–29), the following too was averred:

> 9.4 The Condition was imposed as it would be unfair and unreasonable for non-paying members to enjoy the benefits of a guarded community without making any contribution. All residents and owners have a collective responsibility to ensure the safety of the Residential Area as well as the upkeep of the gardens within the Residential Area.
>
> 9.5 The fees collected from members will be used for the following two primary areas:
>
> a. First, to ensure the security of the area. For this purpose, a guardhouse and boom gate has to be built and manned by security guards.
>
> b. Second, to hire gardeners to maintain and upkeep the roads, gardens and plants/trees in the Residential Area. There are a total of six themed gardens in the area that requires upkeeping.
>
> 9.6 In the event, non-members are given similar access through the boom gate, more residents and owners would refuse to be members of the RA. This would ultimately result in the RA being unable to sustain a guarded community and would be to the detriment of the safety of the community and well as the need to upkeep of the gardens within the Residential Area.

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The RA took the position that the communities' interest is paramount (para 9.7 of AIS).

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DECISION OF THE HIGH COURT (HC)

[17] The grounds of judgment ('GOJ') can be found in encl 3/87–96.

H

[18] The HC identified the crux of the JR application as lying in the differing comprehension of *Au Kien Hoe* ('Au') with the RA's stand being that *Au* applies such that MBPJ must follow that decision and MBPJ contending otherwise (paras 13 and 14, GOJ).

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[19] It was then said in para 15 of the GOJ that *Au* stated that a local authority has power to regulate the guarded community schemes under s 101(v) of the LGA, Street, Drainage and Building Act 1974 ('the SDBA') and Town and Country Planning Act 1976 ('the TCPA').

[20] *Au* was distinguished as there is nothing in that case which relates to conditions imposed by MBPJ and the issue there was whether inconvenience amounts to an actionable nuisance (paras 18 and 22, GOJ).

[21] It was also observed that the RA had not challenged the 2017 guidelines in the JR application. The condition that is now being challenged was the same condition as the 2018 approval and the RA had not raised any issue then or in the 2020 approval until the dispute with non-paying residents occurred (paras 19, 26 and 28 GOJ).

The HC also stated in para 25 as follows:

> [25] Was the imposition of the condition prohibiting the residents' association from requiring non-paying members of the residents' association and non-members to operate the boom gate themselves without the assistance of the security guards something necessary for or conducive to the public safety, health and convenience? Is the act of nonpaying members of the residents' association or non-members of the residents' association opening the boom gate themselves something necessary for or conducive to the public safety, health and convenience? This court finds this to be in the negative. This court is not satisfied that the act of non-paying members of the residents' association or nonmembers of the residents' association opening the boom gate themselves is something necessary for or conducive to the public safety, health and convenience.

[22] It was also said at para 28 that:

> [28] Why then, is the residents' association now challenging the condition by MBPJ? The same condition was previously imposed by MBPJ and the residents' association had accepted this condition. Now, non-paying members and non-members of the residents' association are expected to open the boom gate themselves. It appears to this court, there is a possibility the proposed condition for non-paying members of the residents' association and non-members of the residents' association to open the boom gate themselves may pressure non-paying members of the residents to pay for the security services. It will further encourage nonmembers of the residents' association to become members of the residents' association.

[23] In essence, the HC found that *Au* did not apply; the RA had not raised any issue regarding the condition in the 2018 approval and had not challenged the 2017 guidelines; and that the condition was an attempt to pressure residents into joining the RA. The decision of MBPJ was thus found to be not illegal, irrational or unreasonable.

SUBMISSIONS OF THE RA

[24] The RA submitted that *Au* had determined that the condition was in the larger interest of the community.

[25] It was the contention of the RA that the HC had erred in distinguishing *Au* as follows:

(a) the fact that the cause of action there was for nuisance is irrelevant. The ratio of the decision as set-out above is that the condition is necessary for the larger interest of the community. This finding was made in context of s 101(v) of the LGA;

(b) the fact that the Federal Court did not delve into the types of conditions that can be imposed by MBPJ is equally irrelevant. The RA does not dispute that MBPJ can regulate such matters. However, the exercise of that power must be in line with s 101(v) of the LGA; and

(c) the learned judge had failed to consider that there was no issue of any of the residents being forced or pressured into joining the RA in this case.

[26] There was also no need to specifically challenge the guidelines as it was not binding law or regulations. It was the decision to reject the RA's application to impose the condition that is binding and now being challenged.

SUBMISSIONS OF MBPJ

[27] MBPJ submitted that the HC had correctly analysed *Au* which dealt with nuisance and had nothing to do with the validity of conditions imposed by MBPJ.

[28] *Au* only decided that guarded community schemes are schemes conducive to public safety in residential areas and that local authorities are empowered under s 101(v) of the LGA to approve such schemes. It did not say that a condition requiring residents who did not participate in its guarded community scheme to operate boom gate on their own was in line with the aforesaid provision of LGA.

[29] The HC was also correct to observe that there had been no challenge on the 2018 approval nor the 2017 guidelines and to hold that the condition was not necessary for reasons of public safety, health or convenience.

[30] The decision was entirely consistent with the provisions in cll 2(f) and 4(d) of the 2017 guidelines. The provisions prohibit any person administering a guarded community scheme from requiring any person from alighting his

vehicle to open a barrier blocking a road. The decision is also consistent with condition 2(iii) in the 2018 approval and condition 4(iii) in the 2020 approval.

[31] In the light of *Au*, MBPJ's earlier 2011 guidelines had been amended by the 2017 guidelines to forbid any discrimination against residents who do not participate in a guarded gate community.

[32] The 2017 guidelines were intended to take into account and balance the rights of those who participated in and did not participate in guarded community schemes.

[33] It was the RA that had incorrectly analysed the findings in *Au* and the HC was correct in not applying the case to the present JR application.

OUR DECISION

2018 approval

[34] The starting point is to look at the 2018 approval dated 2 November 2018 (encl 5/29–30) as below:

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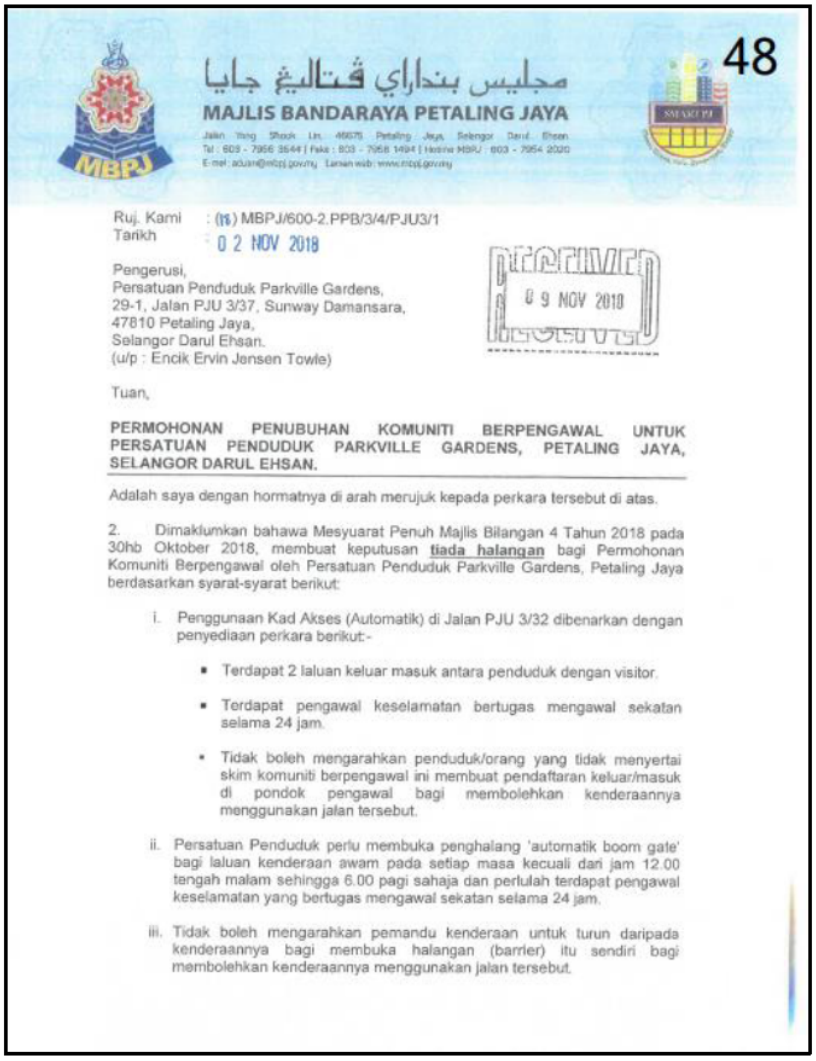

مجليس بنداراي ڤتالينج جايا
MAJLIS BANDARAYA PETALING JAYA

48

Ruj. Kami : (15) MBPJ/600-2.PPB/3/4/PJU3/1
Tarikh : 02 NOV 2018

RECEIVED
09 NOV 2018

Pengerusi,
Persatuan Penduduk Parkville Gardens,
29-1, Jalan PJU 3/37, Sunway Damansara,
47810 Petaling Jaya,
Selangor Darul Ehsan.
(u/p : Encik Ervin Jensen Towle)

Tuan,

PERMOHONAN PENUBUHAN KOMUNITI BERPENGAWAL UNTUK PERSATUAN PENDUDUK PARKVILLE GARDENS, PETALING JAYA, SELANGOR DARUL EHSAN.

Adalah saya dengan hormatnya di arah merujuk kepada perkara tersebut di atas.

2. Dimaklumkan bahawa Mesyuarat Penuh Majlis Bilangan 4 Tahun 2018 pada 30hb Oktober 2018, membuat keputusan **tiada halangan** bagi Permohonan Komuniti Berpengawal oleh Persatuan Penduduk Parkville Gardens, Petaling Jaya berdasarkan syarat-syarat berikut:

i. Penggunaan Kad Akses (Automatik) di Jalan PJU 3/32 dibenarkan dengan penyediaan perkara berikut:-

- Terdapat 2 laluan keluar masuk antara penduduk dengan visitor.
- Terdapat pengawal keselamatan bertugas mengawal sekatan selama 24 jam.
- Tidak boleh mengarahkan penduduk/orang yang tidak menyertai skim komuniti berpengawal ini membuat pendaftaran keluar/masuk di pondok pengawal bagi membolehkan kenderaannya menggunakan jalan tersebut.

ii. Persatuan Penduduk perlu membuka penghalang 'automatik boom gate' bagi laluan kenderaan awam pada setiap masa kecuali dari jam 12.00 tengah malam sehingga 6.00 pagi sahaja dan perlulah terdapat pengawal keselamatan yang bertugas mengawal sekatan selama 24 jam.

iii. Tidak boleh mengarahkan pemandu kenderaan untuk turun daripada kenderaannya bagi membuka halangan (barrier) itu sendiri bagi membolehkan kenderaannya menggunakan jalan tersebut.

3. Pihak tuan perlulah mematuhi segala syarat-syarat Garispanduan Komuniti Berpengawal *(Guarded Community)* di kawasan Majlis Bandaraya Petaling Jaya. Sekiranya didapati pihak tuan gagal mematuhi syarat kelulusan tersebut, pihak Majlis akan mengambil tindakan penguatkuasaan dengan serta merta.

4. Kelulusan ini adalah untuk **TEMPOH 2 TAHUN SAHAJA** bermula **1/11/2018 sehingga 31/10/2020** dan pihak tuan perlu mengemukakan permohonan memperbaharui kelulusan selewat-lewatnya 3 bulan sebelum tarikh tamat tempoh. Sekiranya pihak tuan didapati gagal membuat demikian, Majlis berhak untuk membatalkan kelulusan penubuhan komuniti berpengawal yang telah diberikan.

Sekian, terima kasih.

"MEMBANGUN BANGSA MEMAKMUR NEGERI"
"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalankan amanah,

(TPr. SHARIPAH MARHAINI BINTI SYED ALI)
Pengarah,
Jabatan Perancangan Pembangunan,
b.p: Datuk Bandar,
Majlis Bandaraya Petaling Jaya.

[35] As noted earlier, the approval was for a period of two years from 1 November 2018 until 31 October 2020 and the relevant condition is para 2(iii) where no driver of any vehicle could be ordered to alight from his car to open the boom gate by himself to enable his vehicle to use the access road to the Residential Area.

2017 guidelines

[36] The 2017 guidelines was sent by another letter and condition 4(d) (encl. 5/89) is especially relevant, namely:

> 4. ...
>
> d. Tidak boleh mengarahkan pemandu kenderaan untuk turun daripada kenderaannya bagi membuka halangan (barrier) itu sendiri bagi membolehkan kenderaannya menggunakan jalan tersebut.

2020 approval

[37] Next comes the 2020 approval dated 8 December 2020 (encl 5/92–93) as follows:

> 2. Dimaklumkan bahawa Mesyuarat Penuh Majlis Bilangan 11 Tahun 2020 pada 30 November 2020, membuat keputusan tiada halangan bagi permohonan ini untuk melanjutkan tempoh kelulusan untuk tempoh 2 tahun sahaja bermula 1 Disember 2020 sehingga 1 Disember 2022.
>
> ...
>
> 4. Pemohon juga dikehendaki mematuhi segala syarat-syarat kelulusan Majlis seperti berikut:
>
> (i) Penggunaan kad Akses (Automatik) di Jalan PJU 3/32 dibenarkan dengan penyediaan perkara berikut:-
>
> – Terdapat 2 laluan keluar masuk antara penduduk dengan 'visitor'.
>
> – Terdapat pengawal keselamatan bertugas mengawal sekatan selama 24 jam.
>
> – Tidak boleh mengarahkan penduduk/orang yang tidak menyertai skim komuniti berpengawal ini membuat pendaftaran keluar/masuk di pondok pengawal bagi membolehkan kenderaannya mengunakan jalan tersebut.
>
> (ii) Persatuan Penduduk perlu membuka penghalang 'automatik boom gate' bagi laluan kenderaan awam pada setiap masa kecuali dari jam 12.00 tengah malam sehingga 6.00 pagi sahaja dan perlulah terdapat pengawal keselamatan yang bertugas mengawal sekatan selama 24 jam.
>
> (iii) Tidak boleh mengarahkan pemandu kenderaan untuk turun daripada kenderaannya bagi membuka halangan (barrier) itu sendiri bagi membolehkan kenderaannya mengunakan jalan tersebut.
>
> ...

[38] The approval was for a further period of two years from 1 December 2020 until 1 December 2022.

Requirement that no driver to alight from vehicle to open boom gate

[39] It is not disputed that the condition in para 4(iii) is identical to that of the condition in para 2(iii) of the 2018 approval. In fact, all the conditions in the 2020 approval are identical to the 2018 approval.

The condition and request for exemption

[40] It was only by letter dated 21 December 2020 (encl 5/103–104) that the RA wrote to MBPJ that it will be imposing the condition that non-paying owners and residents or non-residential members of the RA have to operate the

boom gates by themselves without the assistance of security guards.

[41] This was followed by a further similar letter dated 29 January 2021 (encl 5/107–109). It concluded as follows:

> Oleh yang demikian, kami berharap pihak Majlis dapat memberikan kecualian syarat 4 (iii) tersebut bagi pihak kami melaksanakan peraturan bahawa mereka yang tidak membayar caj keselamatan menolong diri dalam membuka palang ('boomgate') tanpa pertolongan pengawal keselamatan.
>
> The rest of the page is intentionally left blank.

THE DECISION

[42] By letter dated 7 April 2021, MBPJ informed the RA of the decision (encl 5/112–113):

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MAJLIS BANDARAYA PETALING JAYA
مجلس بندراي فتالينج جايا
Jalan Yong Shook Lin, 46675 Petaling Jaya,
Selangor Darul Ehsan.

Ruj. Kami : (19) MBPJ/600-2.PPB/3/4/PJU3/1
Tarikh : 07 APR 2021

Pengerusi,
Persatuan Penduduk Parkville Jalan PJU 3/32-3/37,
29-1, Jalan PJU 3/37,
Sunway Damansara,
47810 Petaling Jaya,
Selangor Darul Ehsan.
(u/p : Encik Chow Hau Mun)

Tuan,

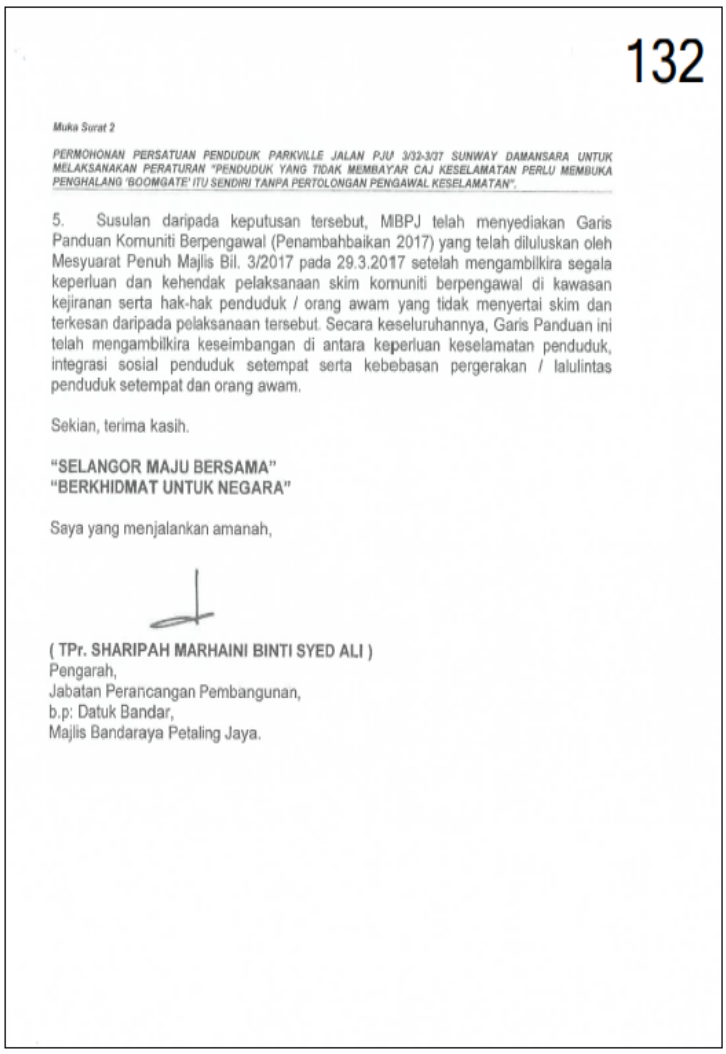
PERMOHONAN PERSATUAN PENDUDUK PARKVILLE JALAN PJU 3/32-3/37 SUNWAY DAMANSARA UNTUK MELAKSANAKAN PERATURAN *"PENDUDUK YANG TIDAK MEMBAYAR CAJ KESELAMATAN PERLU MEMBUKA PENGHALANG 'BOOMGATE' ITU SENDIRI TANPA PERTOLONGAN PENGAWAL KESELAMATAN".*

Dengan segala hormatnya merujuk kepada perkara di atas.

2. Dimaklumkan bahawa Mesyuarat Penuh Majlis Bilangan 2 Tahun 2021 pada 30 Mac 2021, membuat keputusan **menolak** permohonan Persatuan Penduduk Parkville Jalan PJU 3/32-3/37 Sunway Damansara untuk meiaksanakan peraturan *"Penduduk yang tidak membayar caj keselamatan perlu membuka penghalang 'boomgate' itu sendiri tanpa pertolongan Pengawal Keselamatan"*.

3. Sehubungan dengan itu, Persatuan Penduduk dikehendaki mematuhi syarat-syarat kelulusan sepertimana keputusan Mesyuarat Penuh Majlis Bil. 11/2020 pada 30 November 2020. Sekiranya Persatuan Penduduk masih enggan mematuhi syarat-syarat kelulusan dan Garis Panduan Komuniti Berpengawal MBPJ (Penambahbaikan 2017), pihak Majlis akan membatalkan kelulusan yang telah diberikan sebelum ini dengan serta merta.

4. Untuk makluman tuan, Pihak Berkuasa Tempatan (PBT) mempunyai kuasa dan tanggungjawab di bawah Akta Kerajaan Tempatan Tahun 1976 (Akta 171), Seksyen 101 (1) (v) iaitu "melakukan segala perkara yang perlu untuk atau yang bermanfaat kepada keselamatan, kesihatan dan kesenangan awam". Mahkamah Persekutuan Malaysia pada 19.3.2015 telah membuat keputusan bahawa PBT mempunyai kuasa untuk meluluskan skim komuniti berpengawal di seluruh kawasan pentadbiran PBT.



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Muka Surat 2

PERMOHONAN PERSATUAN PENDUDUK PARKVILLE JALAN PJU 3/32-3/37 SUNWAY DAMANSARA UNTUK MELAKSANAKAN PERATURAN "PENDUDUK YANG TIDAK MEMBAYAR CAJ KESELAMATAN PERLU MEMBUKA PENGHALANG 'BOOMGATE' ITU SENDIRI TANPA PERTOLONGAN PENGAWAL KESELAMATAN".

5. Susulan daripada keputusan tersebut, MBPJ telah menyediakan Garis Panduan Komuniti Berpengawal (Penambahbaikan 2017) yang telah diluluskan oleh Mesyuarat Penuh Majlis Bil. 3/2017 pada 29.3.2017 setelah mengambilkira segala keperluan dan kehendak pelaksanaan skim komuniti berpengawal di kawasan kejiranan serta hak-hak penduduk / orang awam yang tidak menyertai skim dan terkesan daripada pelaksanaan tersebut. Secara keseluruhannya, Garis Panduan ini telah mengambilkira keseimbangan di antara keperluan keselamatan penduduk, integrasi sosial penduduk setempat serta kebebasan pergerakan / lalulintas penduduk setempat dan orang awam.

Sekian, terima kasih.

"SELANGOR MAJU BERSAMA"
"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalankan amanah,

(TPr. SHARIPAH MARHAINI BINTI SYED ALI)
Pengarah,
Jabatan Perancangan Pembangunan,
b.p: Datuk Bandar,
Majlis Bandaraya Petaling Jaya.

[43] By this decision, MBPJ rejected the RA's application to impose the condition and the RA was required to comply with all conditions of the 2020 approval.

Analysis of Au Kien Hoe

[44] In *Au*, the appellant was the purchaser of a unit in a housing area. The respondent had decided that residents who did not pay the monthly fee for security and maintenance charges would have to open the boom gates themselves without the assistance of the security guard on duty. The appellant sued the respondent for nuisance in obstruction. The questions of law at the Federal Court were as follows:

(a) whether the erecting of a guard house and a boom gate across a public road in a residential area amounts to an obstruction within the meaning of s 46(1)(a) of the Street, Drainage and Building Act 1974 ('the SDBA'); and

(b) whether a local government is empowered to authorise or otherwise approve an obstruction within the meaning of s 46(1)(a) of the SDBA.

[45] The first question was answered in the negative. The second question was not answered as it was not necessary to answer for being too general and not based on specific factual circumstances.

[46] It is readily apparent that *Au* is a case on nuisance in obstruction where it was held that the complaint was one of inconvenience and not obstruction. We also agree that the type of condition that can be imposed by MBPJ was also not an issue. But that does not end the matter.

[47] We find that in answering the first question that a boom gate is not an obstruction and there was only inconvenience, the Federal Court had construed that the larger interest of the community must be considered when reading s 101(v) of the LGA and s 46(1)(a) of the SDBA.

[48] We note firstly what the Court of Appeal said in *Au Kean Hoe v Persatuan Penduduk D' villa Equestrian* [2014] 3 MLJ 719 at p 733; [2014] 10 CLJ 1 at p 17, as follows:

[41] For the above reasons, we agree with the conclusion and finding of the learned judge in this case, that is neither unreasonable to direct the guards not to assist residents who had not paid the security charges especially when all residents (except the plaintiff) had agreed to adhere to the notice of self-service entrance and had paid for the fees upon receipt of the notice nor there is a real interference with the comfort or convenience of living according to the standard of average man by having the guard house and the boom gates at the housing estate. We are of the view that the defendant have not committed any act of nuisance by maintaining the boom gates and the guard house on the only road at the entrance to the housing estate in the circumstances.

[49] The Court of Appeal decision was affirmed by the Federal Court.

[50] We would now need to refer in extenso to the relevant passages of *Au*.

[51] It is not disputed that the Federal Court had held that MBPJ is the rightful authority for the approval of guard house and boom gate as 'buildings' under the SDBA (para 19). It was next said in paras 20 and 21 as follows:

[20] In the context of the present case useful reference can be made to another statute, the Local Government Act 1976 ('the LGA') which contained provision

empowering the local authority to do all things necessary for or conducive to the public safety, health and convenience (see s 101(v)). In this regard it cannot be disputed that guarded communities are schemes implemented to improve public safety and security in defined residential areas.

[21] It is our judgment that the guard house and boom gates are duly authorised structures under the relevant statues namely the TCPA, the SDBA and the LGA and cannot therefore in law be an obstruction under s 46(1)(a) of the SDBA as posed by the first question in this appeal.

[52] It then went on to say at para 23 that regulated access is not an obstruction and also had occasion to refer to the earlier guidelines:

[23] We shall now deal with the issue of nuisance. It is noted that the two questions posed in this appeal are premised on the assumption that operating a security gate system in a residential area is an actionable obstruction in law. In our view this is clearly wrong. A regulated access to a defined area is not an obstruction in law especially if it is for security purposes. It is so only if one is denied access to a public place. It is not a barricade that is placed across a public road that denies access altogether to all who wish to enter. The MBPJ guidelines, on which the January 2012 approval was given, addresses this issue. The guidelines in relation to a guarded community deal with the rights of those residents who opt not to participate in the security scheme. It says in para 2(f) of the guidelines as follows:

> Penghuni yang tidak menyertai skim ini tidak boleh dihalang sama sekali memasuki kediaman mereka pada bila-bila masa

[53] It is relevant to note that then such a condition being imposed by the RA was not prohibited.

[54] Finally, the court said at paras 24 and 26:

[24] It is noted in the present case that the appellant does not complain that he or his family are prohibited from access at all or that the boom gates are a barricade against him or his family. His complaint is that he is inconvenienced because he has to engage in self-service to lift the gate. In short, the appellant's complaint in reality is a complaint of inconvenience and not of obstruction.

...

[26] We are of the view the underlying rule is a recognition that individuals live within a community and it is always the balancing of the individuals' inconvenience against the communities' interest that is of paramount concern. On this point in *George Philip & Ors v Subbammal & Ors* AIR 1957 Tra-Co 281, the High Court in India observed as follows:

> Every little discomfort or inconvenience cannot be brought on to the category of actionable nuisance. Consistent with the circumstances under which a person is living, he may have to put up with a certain amount of inevitable annoyance or inconvenience. But if such inconvenience or annoyance exceeds all reasonable

limits, then the same would amount to actionable nuisance. The question as to what would be a reasonable limit in a given case will have to be determined on a consideration as to whether there has been a material interference with the ordinary comfort and convenience of life under normal circumstances.

Application of Au to this appeal

[55] The Federal Court thus found that the condition in *Au* that residents who did not pay the monthly fee for security and maintenance charges would have to open the boom gates themselves without the assistance of the security guard on duty was not a nuisance in the interest of the community.

[56] Therefore, the ratio underlying *Au*, where the appellant had been inconvenienced is the recognition that individuals live in a community and there has to be a balancing between the rights of the individual or what is termed as inconvenience as opposed to the interest of the community at large.

[57] It is in this context that we say that the condition imposed by the RA was in the larger interest of the community.

[58] In this particular instance, the 2017 guidelines in para 2(b) (encl 5/88) required the consent of 75% of residents to agree to a guarded community and 77.7% of residents had consented. This is evident from the application for the 2020 approval (encl 5/85).

[59] We had referred earlier to para 9.4 of the AIS and it bears reiterating that the condition was imposed as it would be unfair and unreasonable for non-paying members to enjoy the benefits of a guarded community without making any contribution. With this condition, the non-paying members would merely suffer the convenience, as in *Au*, in having to having to operate the boom gate without the assistance of security guards. There must be a sense of collective responsibility towards the greater good to ensure the safety and security of the residential area.

[60] It was averred in para 9.8 of the AIS (encl 4/29):

9.8 Further, at that material time, there were a number of thefts and attempted thefts in the Residential Area. There was a break-in accident where a resident lost valuable items valued at around RM100,000.00. There were a few break-in attempts which were foiled by the residents and security guards. All these incidents happened in a period of one year.

This shows there was a security and safety issue

[61] The fees collected go towards the security and upkeep of the Residential Area. This has been explained in para 9.5 of the AIS referred to earlier (encl 4/28–29).

[62] Section 101(v) of the LGA provides that MBPJ as a local authority has the power:

> In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely —
>
> ...
>
> (v) to do all things necessary for or conducive to the public safety, health and convenience;

[63] There is therefore no doubt that MBPJ has those aforesaid powers. *Au* had recognised that MBPJ is the rightful authority for the approval of boom gates. This power has however to be exercised in the light of the decision in *Au*, to balance the rights of the individuals against that of the community.

[64] Given the factual matrix of the case, the refusal to exempt the RA from the condition where no driver of any vehicle could be ordered to alight from his car to open the boom gate by himself to enable his vehicle to use the access road to the residential area, is not reasonable. Effectively this renders the decision not to allow the imposition of the condition as unreasonable. We reiterate that the larger interest of the community has to prevail over the rights of individuals, where the issues of public safety and security has to prevail over matters of inconvenience. The condition is necessary to ensure the proper functioning of a security system for the residential area.

[65] It is further unreasonable for non-paying individuals to enjoy the benefits of a guarded community without making any contribution and not having to fork out a single cent. It cannot be construed to be an attempt to force residents into joining the RA. The relevant paragraphs in the AIS referred to by us, dispels that notion.

[66] It is only reasonable that the RA is entitled to impose the condition it sought and as a consequence the decision is quashed.

No challenge to 2017 guidelines

[67] It is further not disputed that the RA did not challenge the 2017 guidelines. It is also not disputed that the RA had not raised any issue on the 2018 approval then and that when submitting its application for the 2020

approval, the RA did not ask MBPJ to review any of the conditions that applied to the 2018 approval.

[68] In this regard, we note that the RA had been de-registered on 21 November 2018 after its application for the 2018 approval on 12 December 2017. During the period of de-registration, the RA could really do nothing. It was only after its re-registration on 26 December 2019 and the AGM on 19 September 2020, that the RA could really pursue the Condition. Soon after the 2020 approval it had addressed the issue with MBPJ. We find that nothing really turns on the RA not having raised the issue of the condition in the 2018 approval.

[69] There was also no necessity to challenge the 2017 guidelines. What is being correctly challenged is the decision to reject the RA's application to impose the condition, which was binding on the RA. Order 53 r 2(4) of Rules of Court 2012 stipulates that any person who is adversely affected by the decision in relation to the exercise of the public duty or function is entitled to make a JR application. The RA was indeed adversely affected by the decision.

CONCLUSION

[70] For the above reasons, we allowed the appeal and set aside the decision of the HC. Consequently, we allow para 1.1 and 1.2 of the JR application. We award costs of RM8,000 here and below to the appellant, subject to allocatur.

Appeal allowed.

Reported by Ashok Kumar